No. 2678

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IN THE

# United States Circuit Court of Appeals

**For the Ninth Circuit**

M. F. HALL,
*Plaintiff in Error,*

vs.

UNITED STATES OF AMERICA,
*Defendant in Error.*

## BRIEF OF DEFENDANT IN ERROR

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FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

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## BRIEF OF DEFENDANT IN ERROR

The plaintiff in error relies on two points for a reversal of the case. They are:

*First:* That the trial court erred in admitting certain testimony of Charlotte Geis, because

(a) It was not shown that she understood the nature of an oath; and

(b) Her testimony was not admissible as it related to transactions too remote.

*Second:* That the trial court erred in giving instruction number 14, which appears at pages 313-314 of the transcript.

## ARGUMENT.

An examination of the transcript shows that the Assignment of Errors on Writ of Error, at pages 326-328 inclusive, does not "quote the full substance of the evidence admitted," as required by Rule 11 of this Court.

Counsel has attempted to cure this defect by securing an order granting permission to file an Amended Assignment of Errors, which appears at pages 328 and 329 of the transcript just following the order referred to.

This can be of no avail and would not be considered by this Court on account of the provisions of Rule 11, which provides that

> "The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed."

If the plaintiff stands on his Assignment of Errors he has not complied with the Rule in that he did not quote the evidence admitted and objected to, and if he stands on the Amended Assignment of Errors he has not complied with the Rule in that he did not file it with his petition for the writ of error nor until after the writ of error had been allowed.

The Circuit Court of Appeals, Fourth Circuit, has held that an Assignment of Errors not filed at the time the plaintiff in error files his petition for a writ of error will not be considered by the Appellate Court, even though the trial court at the time the petition is filed grants additional time for filing an Assignment of Errors and it is actually filed within the time granted.

*Mutual Life Insurance Company of New York* vs. *Conoley,* 63 Fed. Rep., p. 180.

*On the merits the record shows that the witness Charlotte Geis qualified and that her testimony was competent.*

Charlotte Geis was nine years old, lacking but two months of being ten, when she testified (Tr. p. 150) and the record shows that she answered all questions asked in an intelligent manner and understood the nature of the inquiry (Tr. pp. 150 and following).

The record also shows that she was asked a great number of preliminary questions to enable the Court to determine whether or not she was of ordinary intelligence and understood the nature of an oath. The trial judge considered her a competent witness, and unless the record discloses plain error in that regard, his ruling should not be disturbed.

*Wheeler* vs. *United States,* 159 U. S. 523; 40 L. Ed. 244.

In the case last cited a boy nearly five and a half years of age testified as to a homicide committed when he was almost five, and was held to have been competent.

The witness Charlotte Geis testified as to acts committed by the defendant on her person about two years and seven months prior to the date of her testimony and about two years before the date of the acts of defendant, set up in the indictment here. Such testimony is admissible to show intent.

12 Cyc. 408;

*Wolfsohn* vs. *United States,* 101 Fed. 430; 102 Fed. 134;

*United States* vs. *Kenny,* 90 Fed. 257.

The period of time within which the matter offered to establish the guilty purpose must have occurred to permit of their admission is largely discretionary with the trial court and the objection that it is too remote goes only to its weight.

*Spurr* vs. *United States,* 87 Fed. 701, at page 711;

*Moore* vs. *United States,* 150 U. S. 60.

The testimony of Charlotte Geis is competent to show a depraved and lascivious mind on the part of this middle-aged man, and a tendency to commit the crime charged. Instructions 16 and 17, at pages 315, 316 and 317 of the transcript were carefully

drawn and given to guide the jury as to the purpose of her testimony and with the instructions given there is no error in its admission.

*Instruction 14 was proper and no error was committed by the trial judge in giving this instruction.*

The appellant assigns as error the giving of instruction 14 because "it seems to particularly point out the defendant's testimony and distinguish it from that of the other witnesses in the case . . ."

We respectfully contend that this is not error. Instruction 14 was merely a restatement of instruction 11, with proper matter added. While it dealt solely with the defendant, still it was proper for the trial judge to call the jury's attention to the status of a defendant who takes the witness stand on his own behalf, and the instruction here complained of is one that is often given, and has generally met with the approval of reviewing courts everywhere.

> "The instruction of the Court in relation to the credibility of the defendant, who offered himself as a witness, was in all respects legal and proper. We do not agree with the learned counsel for the defendant in holding that it is not competent for the Court to single out a particular witness and charge the jury as to his credibility. On the contrary, the less abstract the more useful the charge. Jurors find but little assistance in the charge of a Judge who deals only with the general and abstract propositions which he supposes to be involved in the case, and leaves the jury to apply them

as best they may. The application is sometimes more difficult than the statement of the rule; hence, that is the most useful charge in which the Judge takes up separately the theories, or each reasonable hypothesis, advanced by counsel or suggested by the testimony, and applies to it the law. In this way, what otherwise might be obscure to the jury is made clear and easy of comprehension. It seldom happens that the exigencies of a case bring in question the credibility of all the witnesses, and when they do not there can be no reason why the charge upon that subject should be made so general as to embrace them all. In our judgment, such a course would be likely to cast suspicion where none is due, and thus tend to mislead the jury. Hence, the Judge should confine his charge to those whose credibility has been assailed by counsel or is clouded by the circumstances of the case." *People* vs. *Cronin,* 34 Cal. 191-204.

In *Hirschman* vs. *People,* 101 Ill. 568, the trial court gave an instruction which is, word for word, almost identical with the instruction complained of here, and the Supreme Court of Illinois held it to be not erroneous.

In *McCraken* vs. *People,* 209 Ill. 215; 70 N. E. 749, the Court said:

"The objection to the seventeenth instruction given on behalf of the people is that it specifically points out the accused, and calls attention to their testimony; stating that, if they have wilfully and corruptly testified falsely to any fact material to the issue, the jury had the right to entirely disregard their testimony etc., the contention is that it erroneously calls particular attention to the defendants instead of

relating to witnesses generally. It is substantially in the language of instructions approved in *Hirschman* vs. *People,* 101 Ill. 568; *Leigh* vs. *People,* 113 Ill. 572, and *Seibert* vs. *People,* 143 Ill. 571.

There was no error in giving the instructions."

See also

*Haines* vs. *Territory,* 3 Wyo. 167, 13 Pac. 8;

*State* vs. *Melvern,* 32 Wash. 7, 72 Pac. 489.

In the case of *United States* vs. *Coqutlam,* the district judge, in his charge to the jury, said in part, speaking with reference to certain testimony given by the masters of the schooners involved:

> "I therefore think their evidence should be received with caution, if not wholly rejected where it is contradicted by other evidence, or rendered improbable by surrounding circumstances." 57 Fed. 706-711.

We respectfully submit that there is no error in the record and ask therefore that the judgment be affirmed.

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